

Port Morris Distillery Inc. v Sengdara LLC
2019 NY Slip Op 32897(U)
August 2, 2019
Supreme Court, Bronx County
Docket Number: 28396/2018E
Judge: Alison Y. Tuitt
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NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

PORT MORRIS DISTILLERY INC.,

INDEX NUMBER: **28396/2018E**

Plaintiff,

-against-

Present:

HON. **ALISON Y. TUITT**

Justice

**SENGDARA LLC, GLOBAL ESTATES LLC, 164
REALTY NY LLC, THREE SUNS HOLDINGS LLC,
SANDY SUN LLC,**

Defendants.

The following papers numbered 1-3,

Read on this Plaintiff's Order to Show Cause for a Preliminary Injunction

On Calendar of 10/15/18

Order to Show Cause-Exhibits, Affirmation, Affidavit 1

Affirmation in Opposition 2

Reply Affirmation 3

Upon the foregoing papers, plaintiff's Port Morris Distillery Inc.'s ("Port Morris") Order to Show Cause for an Order: a) staying and tolling, pending the outcome of this action, the running of the period within which plaintiff may cure the alleged violations under a certain commercial lease by the defendants/ landlord in a notice to cure dated May 1, 2018, which date to cure has been tolled to and including July 21, 2018, by Stipulation; b) pursuant to CPLR 6301 temporarily, preliminarily and permanently enjoining and restraining defendants/landlord during the pendency of this action from: (1) taking any steps to terminate plaintiff's leasehold in the subject premises located at 780 East 133rd Street, Bronx, New York based on the purported notice to cure; (2) taking any further action to terminate plaintiff's leasehold interest, including the commencement of a summary proceeding to evict plaintiff from the premises or otherwise interfere with plaintiff's possession of the premises; (3) a judicial declaration to determine the parties' rights and obligations

and a declaration that plaintiff is not contractually obligated to correct or cure the “defaults” cited in the notice to cure; (4) disturbing in any manner the possession and rights of the plaintiff with respect to the premises, is decided in accordance with this decision and Order.

Plaintiff Port Morris is a commercial tenant of premises located at 780 East 133rd Street, Bronx, New York under the terms of a commercial lease agreement dated April 15, 2015 between plaintiff and defendants Global Estate LLC, 164 Realty NY LLC, Three Suns Holdings LLC and Sandy Sun LLC. The lease was signed by Rafael Barbosa, on behalf of Port Morris, and William Feng, on behalf of Global Estate Management LLC. The lease agreement commenced on May 1, 2015 and expires on May 31, 2040.

On or about May 5, 2018, Port Morris received a Thirty (30) Day Notice to Cure (“Notice to Cure”) from defendant Sengdara LLC (“Sengdara”). Port Morris claims that the Notice to Cure was served in bad faith and in retaliation for plaintiff refusing to move from the leasehold premises after being threatened by defendant with termination of the leasehold unless plaintiff pays an increased amount of rent for the premises. Port Morris argues that the Notice to Cure is defective in that it was signed by Sengdara and Port Morris never signed a lease with Sengdara, nor has any notice ever been given that Sengdara is the landlord or had any rights to the subject lease prior to the Notice to Cure.

The Notice to Cure alleges that Port Morris has violated and continues to violate the lease. Specifically, defendants allege that Port Morris has violated Article 4 of the lease entitled “Use and Occupancy” which provides that “Tenant expressly covenants, represents, warrants and agrees that it shall use and occupy the Demised Premises only as a Distillery/Storage space.” Defendants allege that Port Morris has violated this provision in that it is using the premises not as a Distiller/Storage, but as a restaurant, previously known as Gun Hill Tavern, and currently known as Bronx Tavern. The Notice to Cure also states that Port Morris violated and continues to violate Article 8 of the lease entitled “Alterations” which provides, in relevant part, that:

Tenant is permitted to make non-structural interior alterations... without the Landlord’s consent and without the submission of plans and specifications provided, however, in the event any such Alteration which is non-structural in nature requires an application for a building permit to be signed by Landlord or its authorized representative, Tenant shall, in each instance, first obtain Landlord’s prior written consent, which consent shall not be unreasonably withheld or delayed. Notwithstanding the foregoing, in the event the name Tenant herein desires to make structural alterations to the Demised Premises, whether or not a permit is required, Tenant shall, in each instance first obtain Landlord’s prior written consent which shall not be unreasonably withheld or delayed.

....

The term “Alteration” as used in the Lease shall mean any decoration, improvement, additions,

change, installation or work of in, or to the Demised Premises, doors, gates, vaults, radiators, enclosures, and whether or not the same are made in connection with the repair, replacement or addition to trade fixtures or similar machinery and equipment.

In connection with any Alterations, Tenant shall:

....

Submit in advance for Landlord's approval, which approval shall not be unreasonable withheld, all plans and specifications to be used in connection with any structural Alteration. Any such plans and specifications shall be approved by any governmental, municipal, or other authority having jurisdiction, and Tenant shall deliver to Landlord promptly after receipt thereof, copies of such written approvals of such department or governmental authority.

Perform all Alterations in good and workmanlike manner, fully completed... in accordance with all applicable laws, rules and regulations.

....

Tenant shall proceed with Alterations promptly and shall prosecute the same to completion with reasonable diligence and continuity.

Tenant shall, at its sole expense, obtain all required consents, authorizations and license from all federal, state and/or municipal authorities having jurisdiction over any of the Alterations. All the Alterations shall be done in accordance with the plans and specifications, and the consents, authorizations and licenses obtained. All Alterations shall be performed in compliance with the provisions of law and regulations applicable thereto.

The Notice to Cure alleges that Port Morris violated and continues to violate Article 8 of the lease in that it has performed illegal structural and non-structural alterations without first seeking and/or obtaining the landlord's required prior written consent, without submitting required plans and specifications and applications for a building permit or obtaining the required government approvals, without performing all alterations in a good and workmanlike manner, fully completed and in accordance with all applicable law, rules and regulations. Defendants allege the alterations include the unauthorized and illegal cutting through the building's second floor unit, and through a structural supporting beam to and through the roof, to install a ventilation duct, as well as physical damage to other portions of the building and the reduction of rentable space in other portions of the building. Port Morris also allegedly, without seeking or obtaining approval, erected a wall to hide the ventilation duct which blocked a fire sprinkler. Defendants further allege that without seeking or obtaining prior written consent, Port Morris permitted unauthorized and illegal alterations in the premises in the form of a build-out of a portion of the premises into a restaurant. The Notice to Cure provided that if Port Morris failed to cure on or before June 18, 2018, the landlord would elect to terminate the tenancy.

In opposition, Port Morris argues that it has always faithfully complied with the terms of the lease. Rafael Barbosa submits an affidavit wherein he states that he and William Valentine are principals of

Port Morris. Mr. Barbosa states that Port Morris never signed a lease with Sengdara so the Notice to Cure is defective. Port Morris further contends that it has not violated Article 4 of the lease and is properly occupying the premises in compliance with the "Use" clause of the lease. Port Morris argues that it is licensed as a Farm Distillery by the New York State Liquor Authority. As such, claims Port Morris, it is permitted to operate as a restaurant or other food and drink establishment, pursuant to the Alcoholic Beverage Control Law, Section 61. Distiller's license. 2-c(e)(ii) which provides: "Notwithstanding any other provision of law to the contrary, the holder of a farm distillery license may (ii) operate a restaurant, hotel, catering, establishment, or other food and drinking establishment in or adjacent to the licensed premises." Port Morris also annexes a copy of the Certificate of Occupancy for the premises which authorizes the permissible use and occupancy of the premises as Distillery, Accessory Tasting Room & Retail Store. The Certificate of Occupancy indicates that it was temporary, issued on April 21, 2015 and expired on July 13, 2015.

Port Morris argues that contrary to the alleged violation of Article 8 of the lease, since 2014 the landlord consented and approved the alterations and structural plans for the restaurant known as Bronx Tavern as indicated in the architect plans signed by William Feng, the agent of defendant Global Estates LLC. Mr. Barbosa states that between May 2014 and November 2015, he and Mr. Feng had several conversations concerning the build-out of the building and the landlord actively encouraged and participated, making suggestions for design, assisting with the architect and getting plans approved. Mr. Barbosa states that on or about April 15, 2015, the day they signed the new lease, Mr. Feng emailed him about the water meters for the restaurant. Mr. Barbosa continues to document his dealings with the landlord regarding the restaurant through November 21, 2016, with the landlord consenting and approving the build-out of the restaurant. Mr. Barbosa claims that Mr. Feng was also actively involved in the design and location of the ventilation duct and approved its location and construction. Notwithstanding its claims that it is not in breach of the terms of the lease, Port Morris states that it is ready, willing and able to cure any alleged violations regarding the ventilation duct and have it moved to an alternate location. Port Morris argues that contrary to defendants' contention, the Fire Department of the City of New York ("FDNY") did not issue summons due to alterations. One summons was dismissed, and Port Morris claims that it has complied with the other violation and expects it to be dismissed.

Port Morris argues that it is the landlord who has breached the lease, including breaching: Article 42 which provides that the tenant shall peaceably and quietly hold and enjoy the demised premises throughout the lease term; Article 8 which provides that the landlord shall not unreasonably withhold its consent and approval to alterations; Article 4 in its refusal to acknowledge that Port Morris is occupying the premises in

accordance with its use as a distillery/storage space; landlord's refusal to acknowledge its prior consent and approval to the use of the premises as a restaurant despite the approval of the prior landlord since 2014 and implied consent and approval by its actions and in electronic mail correspondence between the parties; landlord's refusal to acknowledge the prior consents and approvals by its agent and representative William Feng, principal of Global Estate LLC, who signed off on Port Morris' plan to build a restaurant which plans have been filed with the DOB; landlord's refusal to acknowledge its prior consent and approval, and unreasonably withholding its consent and approval to alterations and build-out as a restaurant; landlord's interference with the operation of Port Morris' business; and, landlord's refusal to allow access to the premises by building a door at the premises.

Port Morris contends that the landlord's pattern of misconduct continues. Port Morris has been operating as an eating establishment since 2016 and the landlord never objected to use of the premises as a restaurant. In fact, the landlord assisted and worked with Port Morris to build the restaurant, signed plans with the DOB and made recommendations for the space. Mr. Barbosa states that he understood this as approval and consent of the restaurant, Bronx Tavern. Notwithstanding the Notice to Cure, and threatened termination of its lease, Port Morris claims that it has complied with the FDNY violations, will do whatever necessary to cure the alleged breaches, will assist in obtaining the final approvals for the ALT-1 permit and make the necessary repairs to the duct.

Mark Lee, a member of defendant Sengdara, submits an affidavit stating that Sengdara is one of the owners of the subject premises and has been the manager of the building since January 2017. Sengdara purchased its ownership interest in the premises from Global Estate LLC on January 1, 2017, and Mr. Lee assumed managerial responsibilities at the premises. In January 2017, he informed all of the tenants of the change of ownership and management, and began to visit the building semi-weekly. Further to acknowledge the change in ownership, he requested that tenants amend their insurance certificates to reflect the change in ownership. Mr. Barbosa emailed him an endorsement adding "Landlord onto policy as Additional Insured Sengdara LLC". Pursuant to the lease, Port Morris was to use the space for "Distillery/ Storage". On September 6, 2012, Port Morris' architect, Kushner Studios Architecture & Design, P.C. ("Kushner Studios") applied for an ALT1 permit from the New York City Department of Buildings ("DOB") to change the use of a portion of the distillery and accessory tasting room.

On April 21, 2015, the DOB granted Port Morris a temporary Certificate of Occupancy which expired on July 13, 2015. There have been no renewals to the temporary Certificate of Occupancy, and there is

presently no effective Certificate of Occupancy permitting Port Morris to operate a distillery at the premises. Mr. Lee states that he has requested that Port Morris obtain its sign-offs and complete its ALT1. He further states that the items required to be completed for the sign-off on Port Morris' ALT1 are: a Certificate of Occupancy; cost affidavit final PW3; As-Built Energy Analysis (EN2); final plumbing sign-off; final electrical sign-off; verify tax lot; CO OBJ: verify address - TOPO Stamp; violations search; open applications search; folder review; construction (OT) sign-off; 90 day plumbing, temp dated 4/13/15 expires on 7/13/15, this TCO is for 90 days, TCO issued only for 83 days due to plumbing sign-off.

Mr. Lee states that since Port Morris has not taken any steps to completing its ALT1, in April 2018, he directed the attorneys for the premises to serve a Notice to Cure. Since service of the Notice to Cure, Port Morris has done nothing towards obtaining a sign-off or completing its ALT1. Additionally, Port Morris does not possess a Certificate of Occupancy to operate a restaurant at the premises. Article 16 of the lease provides that Port Morris is required to obtain all governmental approvals, certificates and permits for the operation of its business. On July 10, 2018, Kushner Studios, Port Morris' architect, withdrew its application to change the use of the space and has taken no further actions. Mr. Lee further states that Port Morris installed an unauthorized exhaust vent that rises directly through the ceiling of the restaurant, though the space of the unit directly above the restaurant, and through the roof of the building, cutting through not only the floor of the unit above the restaurant, but also the structural beams supporting the roof of the building. The vent was installed without permission from the landlord or the DOB. The vent is concealed behind a wall erected by Port Morris to hide it. The wall Port Morris had erected blocks a sprinkler head. Moreover, the FDNY issued two violations to Port Morris for the unauthorized duct work lacking the required flame resistant material and insulation, and for failing to submit evidence of approved plans concerning combustible liquid storage areas and the distillation process area. In a "Certificate of Correction Disapproval Letter" dated May 1, 2018, the FDNY disapproved Port Morris' Certificate of Correction on the grounds that it "FAILED TO SUBMIT A TM-1 APPLICATION AND PROOF THAT THE PLANS AND TM-1 APPLICATION WAS SUBMITTED TO THE FDNY TECH MANAGEMENT UNIT. COMPLY BY 5/8/18 OR ATTEND THE HEARING ON 5/24/18".

Defendants also argue that Port Morris has been using a loading bay as a public assembly area without authorization by arranging seating and tables for customers to gather, eat and drink. Port Morris does not have permit to use the loading bay as a public assembly area, and the expired temporary Certificate of Occupancy appears to allow a maximum occupancy of 12 people in the distillery, and 20 people in the accessory tasting room and retail store. With respect to the storage lease, Port Morris occupies 3,788 square feet of space

to be used as “Distillery/Storage” on the first floor. Pursuant to Article 23 of the lease, Port Morris may not transfer, assign or sublet either all or a portion of the premises without first obtaining the landlord’s written consent. Mr. Lee states that he inquired about Sol Cacao LLC (“Sol Cacao”) which appeared to be operating a business in the storage space. Mr. Valentin told him that it was one of their partners who would be making chocolate for their chocolate liqueur. However, Port Morris had in fact sublet the storage area to Sol Cacao. Dominic Maloney, a member of Sol Cacao, states that in 2016, Port Morris held itself out as the owner of the premises covered under the storage lease and directly leased out 1,704 square feet of the premises to Sol Cacao and collected rents. He states that Port Morris caused a partition wall to be erected, and for a bathroom, sinks, lights and electrical outlets to be installed in the storage space, and an opening to be cut in the brick exterior wall. Mr. Maloney states that they were duped into investing time, resources and reputation on a location that was not theirs to lease. Mr. Lee states that Port Morris attempted to sublease the restaurant space to BKRDL LLC doing business as Gun Hill Tavern which was the original operator of the restaurant space. Port Morris also misrepresented to the landlord that Gun Hill Tavern was a partner, and that Gun Hill Tavern had obtained authority from the landlord to operate the restaurant space. Mr. Lee states that he was approached by Gun Hill Tavern in October 2017 for confirmation that the owners of the building consented to a sublease and was informed that Gun Hill Tavern had already invested approximately \$300,000 in the build-out of the restaurant space, and were going to be paying Port Morris another \$250,000 purportedly to purchase a sublease of the restaurant space. Soon thereafter, Gun Hill Tavern left the restaurant space. Mr. Lee states that he has not seen any permits from the DOB for Port Morris to perform these alterations and build-out of the restaurant, and it did not have the landlord’s prior written consent. Mr. Lee contends that the unworkmanlike and unauthorized plumbing work installed in the storage area has caused backups and flooding to other tenants in the building in heavy rains, and provides a copy of an invoice dated August 10, 2018 for service to Global Estate Mgmt. Improvement for job site 789 East 132nd St Bronx, NY in the amount of \$1,650.00 to clear out drain sewage line affecting Studio and Chocolate Co.

Pursuant to First National Stores v. Yellowstone Shopping Center, 21 N.Y.2d 630 (1968), plaintiff must show that (1) it holds a commercial lease; (2) it has received from the landlord a notice of default; (3) the application was made prior to the termination of the lease; and (4) it has the desire and ability to cure the alleged default by any means short of vacating the premises. See, ERS Enterprises, Inc. v. Empire Holdings, LLC, 729 N.Y.S.2d 23 (1st Dept. 2001) citing Jemaltown of 125th St. v. Betesh/Park Seen Realty Assocs., 496 N.Y.S.2d 16 (1st Dept. 1985); Finley v. Park Ten Assocs., 441 N.Y.S.2d 475 (1st Dept. 1980). The purpose of a

Yellowstone injunction is to maintain the status quo so that a commercial tenant may protect its valuable property interest in the lease while challenging the landlord's assessment of its rights. See, 225 East 36th Street Garage Corp. v. 221 East 36th Owners Corp., 621 N.Y.S.2d 302 (1st Dept. 1995) citing Post v. 120 E. End Ave. Corp., 62 N.Y.2d 19 (1984); Garland v. Titan West Assocs., 543 N.Y.S.2d 56 (1st Dept. 1989); Jemaltown of 125th St., 496 N.Y.S.2d at 16; Podolsky v. Hoffman, 441 N.Y.S.2d 238 (1st Dept. 1981). These injunctions have become commonplace, with courts granting them routinely to avoid forfeiture of the tenant's substantial interest in the leasehold premises. See, Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Associates, 93 N.Y.2d 508 (1999). The *Yellowstone* injunction tolls the curative period contained in a notice to cure, to allow a tenant confronted by a threat of termination of its lease to obtain a stay extending the cure period, so a determination of the merits can be had without the tenant risking forfeiture of its leasehold. See, Empire State Bldg. Associates v. Trump Empire State Partners, 667 N.Y.S.2d 31 (1st Dept. 1997); Garland v. Titan West Associates, 543 N.Y.S.2d 56 (1st Dept. 1984).

Initially, plaintiff Port Morris has met the test for granting *Yellowstone* relief. Plaintiff holds a it holds a commercial lease; it received a notice of default from the landlord and its application was made prior to the termination of the lease and within the 30-Day Notice to Cure period. Moreover, while Port Morris argues that it has complied with the lease terms, it also states the desire and ability to cure any alleged breaches to the lease. See, TSI West 14, Inc. v. Samson Associates, LLC, 778 N.Y.S.2d 29 (1st Dept. 2004)(Plaintiff has satisfied its burden of establishing that it has both the desire and the ability to cure the alleged default by means short of vacating the premises by indicating in its motion papers that it is willing to repair any defective condition found by the court and by providing proof of the substantial efforts it has already made in addressing the complained of condition and this showing is not negated by plaintiff's challenge to the necessity of making further repairs).

In the instant matter, it is beyond dispute that the landlord Global Estate LLC by its agent and representative Mr. Feng consented to Port Morris establishing a restaurant and was actively involved in its planning with Port Morris. In January 2017, Global Estate LLC sold its interest in the premises to defendant Sengdara. This does not change the fact that Global Estate LLC was actively involved and was well-aware of the "alterations" occurring to the demised premises and the knowledge that the lessees intended to convert the space into a restaurant. There is also no dispute that Port Morris began the alterations and transformation of the space with the prior approval and consent of the landlord, as is shown in the documentary evidence provided by Port Morris. Port Morris obtained a temporary Certificate of Occupancy for the premises which was effective

from April 21, 2015 through July 13, 2015. Further proof that the landlord provided prior written consent and approval for the build-out of the restaurant was an email from Mr. Feng to “Karen Cruz” of Kushner Studios, dated May 6, 2014, with a copy to both William Valentin and Rafael Barbosa, wherein he writes: “Hi Karen, please file ALT1 for us, we do not wish to further delay the process” and included the 2000 square feet of restaurant in the final changes for th ALT1 which was Area B of the premises. On or about April 15, 2015, the day Port Morris signed the new lease, Mr. Feng sent an email to both Mr. Valentin and Mr. Barbosa which provides, in relevant part, “Billy and Ralph, we spoke about having a sub water meter for the restaurant but we didn’t talk about the sub water meter for PMD [Port Morris Distillery]”. An email from Mr. Feng to both Mr. Valentin and Mr. Barbosa dated September 7, 2015 provides, in relevant part, “Billy and Ralph, I see your new door came out looking really good and I also noticed you have started renovation on the restaurant. However, the dust from the sand blasting is everywhere including 2nd floor offices... Please work out something with other tenants before it gets out of control. Thanks.” A further email dated September 10, 2015 from Mr. Feng to Mr. Valentin and Mr. Barbosa states that he spoke with the “expediter” about adding “your restaurant kitchen and bathroom under out current plumbing permit”. In email dated February 28, 2016 to Mr. Valentin and Mr. Barbosa, Mr. Feng inquires “what’s your plan on the restaurant floor? Are you plan (sic) to buff it and put an epoxy coating on top? Can you let me know before you do it? We like to do the hallway the same, so we can do it together. Thanks.” Additionally, building plans for the approval of the restaurant submitted by Port Morris through its architect Kushner Studios to the DOB dated July 26, 2016 was signed by William Feng certifying the submitted plans on behalf of the landlord and permitting and authorizing to use the space as a restaurant. A further email dated November 21, 2016, shows the landlord’s knowledge of the restaurant as Mr. Feng advises that certain documents need to be filed and that Port Morris’ architect has to arrange for inspection. Neither Mr. Feng nor any of the defendants dispute the authenticity of the emails.

Thus, it is clear that the landlord approved and consented to Port Morris establishing a restaurant at the demised premises. It is also clear that the landlord was apprised and actively participated in the planning of the construction and build-out of the demised premises into a restaurant. Port Morris’ claim that Sengdara does not have standing to serve the Notice to Cure is without merit as Global Estates LLC sold its ownership interest to Sengdara. Moreover, Port Morris’ claim that it had no notice of a new landlord is refuted by the documentary evidence which shows that Mr. Barbosa emailed Sengdara an endorsement showing that he had added Sengdara as an additional insured on his insurance policy. Thus, Sengdara is the landlord and has standing to enforce the terms of the lease.

However, it is also clear that Port Morris has failed to comply with Article 8 of the lease which requires that Port Morris shall perform all alterations to the premises in a good workmanlike manner, fully completed, and in accordance with all application laws, rules and regulations, and Port Morris shall proceed with all alterations promptly and shall prosecute the same to completion with reasonable diligence and continuity. There is no dispute that Port Morris does not have a Certificate of Occupancy for the premises to be used as a restaurant. The temporary Certificate of Occupancy expired years ago. Moreover, there is no proof that Port Morris has complied with all of the requirements to obtain a valid Certificate of Occupancy, including for the loading bay area. Contrary to Port Morris' contention, there is no evidence that the FDNY violations were dismissed or that the ventilation duct was installed properly. Furthermore, Port Morris has failed to show that the landlord consented to having Port Morris sublease a portion of the demises premises to Sol Cacao. In its reply, Port Morris for the first time submits a purported "transcript" of an audio transcription of a purported recorded conversation that took place on August 4, 2017 allegedly between an agent of the landlord, Samuel Chuang, Mr. Valentin and Mr. Barbosa. This audio transcription submitted in reply is not considered by the Court as there is no indicia of reliability. Port Morris claims that this conversation shows that the landlord consented to Sol Cacao as a subtenant, however, there is no indication as to who recorded the conversation, where it was recorded and how the transcriptionist, Lucille Ortega, was able to identify each voice she heard on the recording. There is no indication that she knew any of the parties or recognized their voices on the recording. She provides a transcript where she assigns different statements to the different parties, but does not explain how she knows that a particular person made each of the statements.

Also in its reply papers, Port Morris argues for the first time that there is a stop work order on the building in effect that prevents them from completing the work that is required to obtain the Certificate of Occupancy. Port Morris attaches an unsigned letter from Kushner Studios dated "8/28/18" which states that "[t]his is to confirm that due to the approximately seven open unrelated applications filed at the premises a C of O cannot be issued. Furthermore there are sprinkler and plumbing permits that are not signed off along with open electrical applications that remain open. These are a few of the outstanding factors that will prevent issuance of an updated certificate of occupancy for the building." The DOB did issue a full stop work order on or about July 11, 2018 due to the withdrawal of Kushner Studios. Based on the letter from Kushner Studios dated August 28, 2018, it appears that they may be again representing Port Morris. However, that is not clear at this juncture. Additionally, Port Morris, also for the first time in reply, submits a letter from Francisco Perez, PE LLC, a professional licensed engineer, dated August 22, 2018, which states that Valentin Williams has

retained their services as a Special Inspection Agency registered with the DOB to provide “inspection services intended to guaranty that the mechanical duct installation of the exhaust ventilation system... [be] executed in a professional manner, complying with all codes and regulations applicable and being part of the design being executed for the NYC DOB jobs #2206000001622 and #20637808.”

Port Morris claims that the stop work order pertains to issues not related to the demised premises and the build-out of the restaurant which is preventing it from obtaining a Certificate of Occupancy. Thus, it is an issue that must be addressed as it needs to be determined if the landlord has obligations that it has not fulfilled in order to permit Port Morris to obtain the necessary Certificate of Occupancy.

Accordingly, the Order to Show Cause is granted to the extent that plaintiff has shown its entitlement to a *Yellowstone* injunction. See, American Youth Dance Theater, Inc. v. 4000 East 102nd St. Corp., 33 N.Y.S.3d 714 (1st Dept. 2016)(Court properly found that plaintiff's defaults were curable and that, having demonstrated its willingness to cure them, plaintiff should be permitted to do so within a reasonable time) citing Baruch, LLC v. 587 Fifth Ave., LLC, 842 N.Y.S.2d 442 (1st Dept.2007); Empire State Bldg. Assoc. v. Trump Empire State Partners, 667 N.Y.S.2d 31 (1st Dept.1997). However, there is no dispute that Port Morris does not have a Certificate of Occupancy for the premises, including the loading bay, to be used as a restaurant. While defendant argues that since the service of the Notice to Cure months ago, Port Morris has not taken any action towards obtaining a sign-off or completing its ALT1, in its reply, Port Morris does show that it has taken steps to complete this project.

It is hereby Ordered and directed that defendants must perform whatever acts are needed, on behalf of the landlord, to allow Port Morris to complete its application for a Certificate of Occupancy. Thus, the Court mandates defendants' cooperation in obtaining and completing whatever documentation is necessary on behalf of the landlord for Port Morris to obtain a Certificate of Occupancy. The parties must work together to obtain a lifting of the stop work order. Once the stop work order is lifted, Port Morris must comply with all of the requirements to obtain a Certificate of Occupancy for the demised premises, including for the loading bay area. Contrary to Port Morris' contention, there is no evidence that the FDNY violations were dismissed or that the ventilation duct was installed properly. Therefore, it is hereby Ordered and directed that Port Morris show proof that the FDNY violations have been dismissed or have been resolved and Port Morris must make the necessary repairs to the ventilation duct, including moving it to an alternate location and restoring the areas in the building that were altered when the duct was installed. Port Morris has failed to show that the landlord consented to having Port Morris sublease a portion of the demises premises to Sol Cacao. Therefore, it is

Ordered and directed that Port Morris show proof, in admissible form, that Port Morris has the landlord's prior written consent for Port Morris to sublet the storage space to Sol Cacao. It is also Ordered and directed that Port Morris continue to make timely rent payments to the landlord, pursuant to the lease. Port Morris must also post an undertaking in the amount of \$100,000. The undertaking must be posted within 30 days after service of this Order with Notice of Entry.

For the foregoing reasons, a preliminary injunction is granted tolling the running of 30 day period until six months after service of this Order with Notice of Entry. Accordingly, defendants are hereby enjoined from terminating or cancelling the plaintiff's leasehold interest for the reasons stated in the Notice to Cure described above until the six months have expired. Should the parties require more time, they are to seek an extension of time from the Court.

This constitutes the decision and Order of this Court.

Dated: 8/2/19



Hon. Alison Y. Tuitt